Supreme Court, U.S.
FILED
SEP 20 1988
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-109

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

AMERICAN PROTEIN CORPORATION,

Petitioner,

vs.

AB VOLVO and VOLVO LASTVAGNAR AB, as successors in interest to Beijerinvest AB, BEIJER INDUSTRIES, INC. and BO LYCKE,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1988
NO. 88-109

AMERICAN PROTEIN CORPORATION,

Petitioner,

- against -

AB VOLVO and VOLVO LASTVAGNAR AB,
as Successors in Interest to
Beijerinvest AB,
BEIJER INDUSTRIES, INC. and BO LYCKE,

Respondents.

PETITIONER'S REPLY BRIEF

This reply brief is necessitated by the factually incorrect statement relied upon by the respondents in claiming that there is no conflict among the circuits in applying Rule 50(b).

As pointed out in the petition (p.12,fn.8), all courts agree that the formality of a Rule 50(b) motion is

unnecessary where the trial court has reserved decision on an earlier motion for a directed verdict made at the close of plaintiff's case awaiting the close of all evidence. To require the renewal of the motion under such circumstances is a procedural technicality which does not serve the underlying purposes of Rule 50(b).

Respondents' statement that decision on the motion was reserved here is incorrect (opposing brief pp. 2-4). As indicated in the petition (p.5), at the close of petitioner's case (not at the close of all evidence) the trial judge ruled that there was sufficient evidence to go to the jury on the issue of tortious interference, petitioner's main claim. As indicated by the record at the close of petitioner's case, respondents moved for a directed verdict on all claims. The trial court held:

> The cause of action of tortious interference with the contract, I deny your motion. This gentleman came over from Sweden and they met in the Sherry Netherlands Hotel at 8 a.m. and in one moment they voted themselves walking around money, I think $15,000 apiece, in next half hour or next ten minutes or whenever it was they voted to wind down the business. Was this the act of Volvo or was this an independent act of the Invest? That's the question.... I may be a hundred percent wrong but I don't think so. I am going to reserve ruling on first, second, third and fourth, those are things that took place long before Volvo got into the act.... But the tortious interference with the contract I think at this point is a serious question for the jury. You may not, but I do. (Joint Appendix pp. 316-317).

The review sought by the petitioner refers only to the tortious interference claim. "The central issue before this Court is the permissable scope of review with respect to the tortious interference claim" (petition p. 6).

To misstate the facts in order to

avoid addressing the issues and the conflict among the circuits serves no useful purpose. I respectfully refer the Court to the petition on this point (Point I, pp. 10-20).

Significantly, the opposing brief also fails to address the substantive errors made by the Second Circuit in reversing a 3 million dollar jury verdict. To only say that there is "no issue worthy of this Court's certiorari jurisdiction" begs the issue (opposing brief p.4). Again, I respectfully refer this Court to the petition on this point (Point II, pp. 21-25).

CONCLUSION

Had this case been tried in the home district of the trial judge, an appeal to the Ninth Circuit would have been summarily affirmed for lack of compliance with Rule 50(b). In marked contrast, the Second Circuit reversed.

The irony of this result underscores the manifest need for uniform application of Rule 50(b) in all the circuits. For this compelling reason, certiorari should be granted.

New York, New York
September 16, 1988

Respectfully submitted,

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